

IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

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BERNARD BLOCH,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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APPELLANT'S REPLY BRIEF

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REPLY BRIEF OF APPELLANT

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OPENING

While we believe that the questions discussed in the Government's Brief were anticipated in our opening Brief we think it might be of assistance to the Court to make some brief references to one or two of the points.

In reference to the amount of morphine distributed by Appellant, we admit a slight error in computing the total volume. However, we do not consider the number of cubic centimeters important. It is the morphine content that is important. For example, 30c.c., the amount alleged in Count V (9) containing 1/16th grain per

cubic centimeter would amount to less than two grains of morphine. While 10 c.c. containing  $\frac{1}{4}$  grain per c.c. would amount to  $2\frac{1}{2}$  grain.

We think the Government also fell into error in this matter. We quote from page 8 of the Government's Brief:

\*\*\*"this Court's attention is drawn to the fact that Counts IV and V of the Indictment refer to 30 c.c. of the narcotic drug, and in this case the two sales were upon the 29th and 30th day of October, respectively."\*\*\*"

Count IV alleged the sale of 10 c.c. of morphine on October 30.

Count II alleged the sale of 10 c.c. of morphine on October 29.

30 c.c. are mentioned in Count V and the sale was on November 10.

## ILLEGAL SEARCH

The Government concluded that because the defendant did not physically resist the search by the officers and did not at the time proclaim his Constitutional rights and object to the search, that he thereby waived his right to contest the search. This reasoning is fallacious and the courts have repudiated it. In that connection we refer to our original Brief on page 5 and 6 and the authorities there cited. The quotation from the Judd case on page 9 is the answer to the Government's argument.

"Intimidation and duress are almost necessarily implicit in such situations."

In the McFarland case cited in the Government's Brief at page 14, there was an instruction submitted to the jury on the question of the legality of the search. In the present case the court assumed that the legality of the search was unimportant because the articles seized were not introduced in evidence. The point overlooked by the trial court was that the Government's witnesses were permitted to testify, basing their testimony upon what they learned by reason of the search.

### ENTRAPMENT

The defense of entrapment was available to the Appellant. While he did not admit the commission of a crime he did admit most of the acts upon which the indictment was based. Illegal entrapment becomes a matter of law for the court to determine just like any other fact that affirmatively appears from the evidence.

In view of the past good record of the appellant we feel that we can safely say and the court could have safely said had it not been for the use of his patient Hernandez and the subterfuge practice by him in introducing Cantu there would have been no delivery of narcotics. It was because of the relationship of Doctor and patient existing between the defendant and Hernandez and the request by Hernandez that appellant was induced to furnish narcotics to Cantu (183).

### PRIOR CONVICTION

Was it prejudicial error to ask appellant if he had ever been convicted of a felony? In reading the Government's Brief on this point, we cannot help but get the impression that the Government feels that it was error and an effort is made to minimize the effect of such error and the influence it might have had on the jury.

In a situation as grave as this and so important to appellant and the effect on his future so serious, we should give serious thought and study to this question. We can forget the immediate punishment and think of the effect on appellant's entire future. It would seem that any doubt should be resolved in his favor. We should not balance a man's future upon our power of divination or our ability to look into the minds of the jurors and say that they were not influenced.

The quotation from the Campbell case, Appellant's Brief 17,

\*\*\*"If one is left in grave doubt, the conviction cannot stand."

We cannot subscribe to the refinement of reasoning used in the authorities cited by the Government when they say that since the evidence of prior conviction is only for the purpose of impeachment and goes only to the credibility of the witness, the mere pendency of an appeal does not effect the admissibility of the evidence. Such reasoning might possibly be applicable to a case where a witness was merely a witness and not the defendant. It is our position that the evidence is inadmissible even for the purpose of effecting the credibility of the defendant as a witness. Are we to be so naive that we can be asked to believe that any jury hearing this testimony would be able to consider it only for the purpose of effecting the credibility and not take it into serious consideration in determining the guilt or innocence of the defendant.

The case of *In re Abrams*, cited in the Government's Brief at page 26, was a disbarment proceeding brought against a lawyer. A committee was appointed by the court and when they made their recommendations and

reports there was a hearing before a court consisting of three judges. After discussing the errors assigned, including the one regarding the respondent's prior conviction, the Supreme Court said:

“But however, that might be the whole matter was a trial before a Judge or Judges and they were able to sift the wheat from the chaff and would not be unduly prejudiced one way or the other\*\*\*”.

In *People v. Rogers*, 297 Pac. 924, cited in the Government's Brief at page 26, neither of the authorities referred to the quotation was there an appeal pending.

In *People v. Ward*, cited in the quotation from *People v. Rogers*, the question was asked of a witness not the defendant. The witness had been convicted but had not been sentenced and there was no appeal pending.

We respectfully submit that the appellant did not have a fair and impartial trial because of the cumulative effect of the errors complained of and had it not been for those errors we have reasonable ground to believe that there would have been no conviction.

Respectfully submitted,

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